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July 30, 2003

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Ex Parte Notice

Re: Carriage of Digital Television Broadcast Signals, CS Docket No. 98-120
(also CS Docket Nos. 00-96 and 00-2).

Dear Ms. Dortch:

On Tuesday, July 29, representatives of Comcast Corporation met with Jordan Goldstein, Senior Legal Advisor to Commissioner Copps, to discuss the above-captioned proceeding. Comcast was represented by James R. Coltharp, Chief Policy Advisor, FCC & Regulatory Policy, and the undersigned.

We stressed that the Commission's evaluation of broadcasters' demands for expanded must-carry rights must begin with an analysis of the applicable statute. Section 614(b)(3)(A) of the Communications Act entitles a broadcaster only to carriage of its "primary video . . . transmission," but the current proceeding is focusing on the extent to which broadcasters should have *additional* carriage rights -- either in the form of compulsory cable carriage of *both* analog and digital broadcast signals ("dual" must-carry) or compulsory cable carriage of *multiple* broadcast program streams ("multicast" must-carry). We further observed that the Commission's judgments should be informed not only by the statute's text, history, structure, and purpose but also by its duty to respect, and avoid conflicts with, cable operators' rights under the First and Fifth Amendments to the U.S. Constitution. (We also suggested that the statutory analysis take into account the Commission's experience with collocation and TELRIC, the former because judicial rulings have repeatedly constrained FCC efforts to allow one party to occupy another party's private property, even *with* compensation, and the latter because, in contrast to the pricing of unbundled network elements, must-carry allows a broadcaster to occupy the private property of a cable operator *without* compensation.) We highlighted ways in which the must-carry requirements now under consideration would differ from -- and therefore deserve much less judicial deference than -- the analog must-carry requirement (confined to a single "primary video . . . transmission") that won affirmance, by the narrowest possible margin, in the Supreme Court's *Turner II* decision. Finally, we discussed Comcast's progress in rolling out high-definition service in 21 major

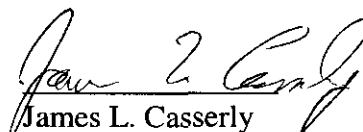
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markets, its progress in accelerating system upgrades that will enable (among other things) the offering of high-definition services in numerous additional markets, and Comcast's continuing progress in reaching HDTV carriage agreements with numerous local broadcasters, including 21 public broadcasting stations

Our presentation relied largely on the reply comments Comcast filed in the dockets listed above on August 21, 2001. We also provided the attached summary of Comcast's position.

This letter is filed pursuant to Section 1.1206(b)(2) of the Commission's rules. Please let me know if you have any questions.

Respectfully submitted,


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Attachment

cc: Jordan Goldstein



THE COMMISSION SHOULD AFFIRM ITS DUAL MUST-CARRY AND PRIMARY VIDEO DECISIONS

A dual must-carry or multicast must-carry requirement would harm consumers as well as cable operators and cable programmers.

- Expanded must-carry obligations would impede Comcast's ability to allocate finite system bandwidth in structuring its services and program packages.
- Any additional bandwidth that must be allotted to compulsory carriage of broadcasters' services necessarily diminishes the bandwidth that can be used to accommodate other video programming channels -- or non-cable services such as competitive telephone and high-speed cable Internet services.
- In large markets, with 20 or more TV broadcasters, the effects of additional must-carry requirements (including possibly six or more separate program streams for *each* broadcast licensee) could be to soak up a significant portion of the bandwidth recently added through expensive upgrades and rebuilds. Upgrades and rebuilds, of course, were funded through private capital raised by Comcast and other cable operators, not funded by the broadcasters that now demand compulsory -- and uncompensated -- carriage.
- Additional must-carry burdens would skew programming purchase decisions by cable operators, inevitably making it more difficult for producers of cable programming -- including those not affiliated with cable operators -- to obtain carriage of their programming services.

To require dual must-carry and/or multicast must-carry would be unlawful.

- The Commission correctly determined that, "[b]ased on the plain words of the Act, we conclude that, to the extent a television station is broadcasting more than a single video stream at a time, only one of such streams of each television signal is considered 'primary.'" To conclude otherwise would raise serious concerns under both the First and Fifth Amendments to the Constitution, thereby violating a cardinal principle of statutory interpretation.
- The bases for the Supreme Court's narrow affirmation of analog must-carry in *Turner* do *not* apply to dual or multicast must-carry rights.
- In the analog context, broadcasters were able to invoke an unambiguous statutory requirement. By contrast, there is no unambiguous statutory requirement for dual must-carry or for carriage of multiple program streams.
- In *Turner*, broadcasters had the benefit of explicit Congressional findings to the effect that free, over-the-air television broadcasting would be jeopardized in the absence of analog must-carry. By contrast, Congress has made no such findings regarding dual or multicast must-carry.

- Analog must-carry passed judicial muster in part because it was deemed to promote “the widespread dissemination of information from a *multiplicity of sources*.” By contrast, granting preferential rights to each broadcaster to distribute two (or even six or more) program streams on a given cable system would potentially *diminish* the ability of other, independent voices to be carried. (This consideration becomes even more powerful in light of the Commission’s decision to expand the opportunities for broadcasters to form duopolies in many markets and to allow triopolies in some markets.)
- Finally, to a much greater degree than in *Turner*, there is compelling evidence that dual or multicast must-carry would impose significant burdens on cable operators and would adversely affect other programmers.

Expanded must-carry requirements are not needed to spur the digital transition.

- The record evidence provided by cable commenters refutes broadcasters’ claims that expanded must-carry requirements are necessary to accelerate the transition.
- Broadcast HD programming is already being provided to cable customers in more than three-quarters of the top 100 television markets where HD is offered.
- Likewise, Comcast’s HDTV service, which typically includes programming from three or more broadcast stations, is now available to more than 11.6 million Comcast subscribers in 20 major television markets, and we plan to launch the service in numerous additional markets before year-end.
- Comcast and other cable operators are successfully negotiating voluntary agreements with broadcasters as well as non-broadcast programmers (*e.g.*, HBO, Showtime) for carriage of their digital signals. Successful negotiations with individual PBS affiliates, based on individual stations’ programming plans and assessments of individual community needs, have led to agreements for carriage of multiple DTV program streams. Consumers are more likely to be drawn to invest in HDTV sets if capacity for HD signals is allocated to networks that consumers want to watch, not to those broadcast stations that are unable to negotiate voluntary agreements for cable carriage of their signals.

Expanded must-carry rights would diminish the incentive for broadcasters to invest in innovative digital content.

- Must-carry serves to insulate the broadcasters’ offerings from the competitive pressures all other programmers face to produce quality programming that will attract viewers. The best way to accelerate the digital transition is to allow competition between digital broadcast and non-broadcast services to drive carriage decisions, based on consumer choice and demand.
- Only full competition among all program providers will ensure that the very best possible digital programming is produced, and this in turn will increase the motivation of consumers to purchase DTV sets.